

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 132 of 2003

BETWEEN : **SHAIBAN ALI KHAN** father's name Janullah Khan of Lovu, Lautoka,
unemployed

Plaintiff

AND : **CARPENTERS FIJI LTD** a limited liability company having its registered office
at Robertson Road, Suva, and a branch at Lautoka

Defendant

JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. H. A. Shah for the Plaintiff
Mr. Suresh Maharaj for the Defendant.

Solicitors: Haroon Ali Shah Esq. for the Plaintiff
Suresh Maharaj & Associates for the Defendant

Date of Hearing: 14 July 2009
Date of Judgment: 23 July 2009

INTRODUCTION

- [1] The Plaintiff was a former employee of Carpenters Motors, a division of the Defendant company. He was dismissed in circumstances which he alleges to be malicious and wrongful.
- [2] The Defendant denies these allegations and says that the Plaintiff was dismissed pursuant to the terms of his contract of employment.
- [3] Both parties called one witness each in a trial that lasted about an hour.

[4] After considering the evidence and Counsel's submissions I have come to the conclusion that the Plaintiff's claim should be dismissed with costs. The Orders that I make and the reasons for my judgment appear below.

THE PLAINTIFF'S CLAIM

[5] The Plaintiff claims in his Statement of Claim:

- (a) General and exemplary damages for malicious prosecution;
- (b) General and punitive damages for wrongful termination;
- (c) Loss of future earnings and Fiji National Provident Fund contributions; and
- (d) Costs on a Solicitor/Client indemnity basis.

[6] The Plaintiff pleaded two causes of action. In the **first**, he alleges that in **December 2001** the Defendant, maliciously and without reasonable cause proffered charges against him of having stolen certain property belonging to the Defendant contrary to section 274 of the Penal Code. In consequence of that he says that he was greatly injured in his reputation and was put to considerable expense and suffered great inconvenience.

[7] In his **second** cause of action he alleges that on **13 December 2001**, the Defendant wrongfully and without reasonable cause summarily dismissed him. He says that he had worked for the Defendant for approximately 10 years without an adverse record prior to his dismissal and as a consequence of the Defendant's conduct he was seriously maligned in his reputation and unable to secure employment commensurate with his qualifications and has suffered loss and damage.

THE DEFENDANT'S CASE

[8] The Defendant of course denies these allegations. Its case is simply that the Plaintiff was employed under a written contract of employment and his employment was terminated in accordance with the terms and conditions of that contract.

THE TRIAL DATES

[9] The matter was first set down for trial on **30 August 2006** but for various reasons, which I will go into later on in this judgment, it did not get heard until **14 July 2009**, a delay of a month short of three years. For such a simple case the delay is totally unacceptable.

THE AGREED FACTS

[10] The agreed facts were:

- (a) The Plaintiff was employed by the Defendant on the terms and conditions contained in an employment contract dated **12 February 1992**.
- (b) On or about **13 December 2001**, the Defendant discovered that there was a part missing from its motor garage at Lautoka and the matter was reported to the Police.
- (c) The Plaintiff's employment was terminated on **13 December 2001**.

THE TRIAL EVIDENCE

[11] The Plaintiff gave evidence. He first worked for the Defendant on 12 February 1992. He confirmed that he signed the contract of employment dated 12 February 1992 and that he understood the terms and conditions contained in the contract and agreed to be bound by them.

[12] He started off as a labourer applying antirust to motor vehicles. After two years he worked as a mechanic, then worked with heavy trucks and progressed to the level of senior mechanic and was assistant garage supervisor when he was dismissed on 13 December 2001. After his dismissal he had difficulty finding work because prospective employers would cross check with the Defendant and the Defendant would allege that he had stolen goods from them. He tried to get references from the Defendant but the Defendant refused. He could not get jobs except car washing on a temporary basis. He washed cars for about 4 months. He remains unemployed to this day.

- [13] He said that the Defendant reported him to the Police and he was charged. His lawyer wrote to the Defendant on 13 December 2001 on his behalf asking the Defendant to withdraw the charge but there was no response. On 29 July 2002 the Police withdrew the charge.
- [14] In cross examination, the Plaintiff was taken through the contract of employment and again confirmed that he signed it and that he understood it and agreed that both he and the Defendant were bound by its terms. He also confirmed that he was given warning letters in September 1994 for carelessness and in May 1995 for negligent workmanship. He confirmed that his Performance Appraisal for 2001 was discussed with him and he accepted the Manager's comments that: "punctuality is very poor – a lot of late arrivals and time offs. Needs to improve." He said that he is 36 years old and holds trade certificates but he cannot get employment because the Defendant will not give him a reference. As to why he did not start his own business his answer was he did not have any money and did not even have a bank account. He confirmed that the Police charged him after they conducted investigations. He was not charged by the Defendant.
- [15] The Defendant called the National Services Manager for Carpenters Motors, a division of the Defendant company, as its witness. He said that the Plaintiff was employed under the normal terms and conditions of contract for employees, including him. He was not shaken in cross examination that the Plaintiff's employment was terminated in accordance with the termination clause in the contract of employment. The termination letter of 13 December 2001 was issued pursuant that clause. The Defendant was paid a week's wages and all outstanding entitlements.

ANALYSIS OF THE EVIDENCE & THE LAW

FIRST CAUSE OF ACTION

- [16] There was no direct or documentary evidence given at the hearing to prove that the Defendant had no reasonable or probable grounds to proffer charges or that the Defendant acted maliciously in so doing. The Police Prosecutor was not called nor was the Magistrates Court file tendered. According to **Jones v Dunkel (1959) 101 CLR 298** I can draw an inference that such evidence would not have helped the Plaintiff.

[17] Instead, the Plaintiff relied solely on an inference to be drawn from a chain of events, namely, that the Defendant made the complaint to the Police, the Police charged and prosecuted the Plaintiff and then later withdrew the charges. No direct evidence was given at the trial as to the real reasons for the withdrawal of the charges. Charges are withdrawn for a whole host of reasons and not always because there was no basis or grounds for proffering them in the first place. In other words, the Plaintiff has failed to prove that the Defendant's action caused the alleged loss of reputation.

[18] In any event, the charges were laid by the Police and not the Defendant. The Defendant made the complaint, the Police investigated and then laid the charges. The decision to lay charges is made by the Police and the Defendant has no say or influence over it. If there was malicious prosecution, the proper party to sue is the Police and not the Defendant.

[19] The first cause of action therefore fails.

SECOND CAUSE OF ACTION

[20] The contract of employment contained the following clause:

"Termination of Employment: You may terminate your service with either a week's notice or a week's wages in lieu of notice thereof. The company, if it considers it necessary, may do likewise."

[21] The evidence in my opinion clearly shows that the Plaintiff's employment was terminated pursuant to this clause. The Plaintiff was paid all his dues payable under the clause and he accepted them.

[22] Counsel for the Plaintiff referred me to the case of **Bikram Chand v Public Service Commission and AG of Fiji**, Civil action HBC 48/1995L. In that case, evidence was given that there were no grounds to dismiss the plaintiff and that the dismissal was unfair. The court also found that there was no evidence of any written contract of employment or collective agreement. The case therefore did not involve termination of employment pursuant to a written contract such as the present case. It can be distinguished from the present case. It does not assist the Plaintiff.

- [23] Counsel for the Defendant relied on **Bakani v Carpenters Fiji Ltd [2008] FJCA 6; AAU0038.2006 (1 April 2008)**. In that case the plaintiff was employed under a written contract containing a termination clause, similar to the present case, of one month's notice or one month's pay in lieu. The Fiji Court of Appeal affirmed the trial Judge's finding that the plaintiff was not unfairly treated. That case is not directly on point but it is useful in that the Court of Appeal did not upset the trial Judge's finding that **"both sides (the employer and the employee) can terminate the contract by giving one month's notice in lieu. Termination can be with cause and without cause as shown by the authorities"**.¹ The authorities which the trial Judge relied on to support his finding were: **Native Land Trust Board Employees Association v. Native Land Trust Board [1998] FCA 28; Diners Club (NZ) Ltd v Narayan [1997] FJCA 46; Abu0004u.96s (28 November 1997); and Yashni Kant v. Central Manufacturing Company Limited, [2002] FJCA 39; ABU0001U.2001S (30 August 2002)**.
- [24] In **Native Land Trust Board Employees Association v. Native Land Trust Board [1998] FCA 28**, the Court of Appeal found that the Native Land Trust Act authorised the Board to implement a restructure and redundancy policy and refused to stay it.
- [25] In **Yashni Kant v. Central Manufacturing Company Limited, [2002] FJCA 39; ABU0001U.2001S (30 August 2002)** the termination clause was more comprehensive and different from the present clause under consideration. There was no evidence however that the plaintiff accepted this term as part of his terms of employment. The Court of Appeal found that **"the provision as to notice in the terms and conditions falls into category 4 in the analysis of Lord Brown-Wilkinson in Delany v. Staples [1992] 1 All ER 944 at p.947. In such a case where "without the agreement of the employee the employer summarily dismisses the employee and tenders payment in lieu of proper notice any payment made is a payment in respect of damages for breach, Gothard v. Mirror Group Newspapers Ltd. [1988] ICR 729."** The Court held that in such a case the employer cannot summarily dismiss by simply paying the wages due for the period of notice. Questions of fairness arise. That case is an entirely different case from the present so it does not assist the Plaintiff here.
- [26] The case of **Diners Club (NZ) Ltd v Narayan [1997] FJCA 46; Abu0004u.96s (28 November 1997)** is directly on point. In that case the plaintiff's employment was subject to termination

¹ At para 33.

by one month's notice or payment in lieu. The employer terminated the plaintiff's employment immediately by payment of one month's salary. The trial Judge's finding that even though the termination clause was activated, the plaintiff was summarily dismissed without good reason was over turned by the Court of Appeal. The Court said:

"In Delaney v. Staples [1992] 1 AC 687 at p 692 Lord Browne-Wilkinson analysed the concept of payment in lieu of notice, identifying four categories. His second describes what happened in this case. It reads:

"The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu."

We respectfully agree with this comment. An employer making the payment in the circumstances postulated is not in breach of contract. Indeed, we cannot see how the position could be otherwise in this case, since both parties agreed that the company could lawfully act in this way. We see nothing in the letter of appointment or in the circumstances of Mr Narayan's employment which could give rise to an implied term that the company should have adequate reasons for exercising its express power to terminate, and in any event this was not pleaded. Whether its reasons for doing so were adequate - or indeed, whether there were any reasons at all - could make no difference to the legality of its action. "

[27] Accordingly, I find that the Plaintiff's claim fails on the second cause of action.

COSTS ON AN INDEMNITY BASIS

[28] Counsel for the Defendant submits that I should depart from the normal rule and award costs on an indemnity basis.

[29] In **Singh v Naupoto [2008] HBC 199/08**, Costs Decision of 8 August 2008, and **Rokotuiviwa v Seveci [2008] FJHC 221; HBC374.2007 (12 September 2008)** Mr Justice Hickey discussed at length the cases on indemnity costs. In **Singh** (supra)² His Lordship referred to the Federal Court of Australia decision in **Colgate-Palmolive Company and Colgate-Palmolive Pty Limited v Cussons Pty Limited; Cussons Pty Limited v Colgate-Palmolive Company and Colgate-Palmolive Pty Limited [1993] FCA 536;**

² At para [12].

(1993) 46 FCR 225 (10 November 1993), in which Sheppard J outlined the principles as follows:³

"It seems to me that the following principles or guidelines can be distilled out of the authorities to which I have referred:-

- 1. The problem arises in adversary litigation, i.e. litigation as between parties at arm's length. Different considerations apply where parties may be found to be entitled to the payment of their costs out of a fund or assets being administered by or under the control of a trustee, liquidator, receiver or person in a like position, e.g. a government agency or statutory authority.***
- 2. The ordinary rule is that, where the Court orders the costs of one party to litigation to be paid by another party, the order is for payment of those costs on the party and party basis. In this Court the provisions of Order 62, rules 12 and 19, and the Second Schedule to the Rules will apply to the taxation. In many cases the result will be that the amount recovered by the successful party under the Order will fall short of (in many cases well short of) a complete indemnity.***
- 3. This has been the settled practice for centuries in England. It is a practice which is entrenched in Australia. Either legislation (perhaps in the form of an amendment to rules of Court) or a decision of an intermediate court of appeal or of the High Court would be required to alter it. No doubt any consideration of whether there should be any change in the practice would require the resolution of the competing considerations mentioned by Devlin LJ in Berry v. British Transport Commission and Handley JA in Cachia v. Hanes on the one hand and by Rogers J in Qantas on the other. The relevant passages from the respective judgments have been earlier referred to.***
- 4. In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the Court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis whether here or in England. The tests have been variously put. The Court of Appeal in Andrews v. Barnes (39 Ch D at 141) said the Court had a general and discretionary power to award costs as between solicitor and client "as and when the justice of the case might so require." Woodward J in Fountain Selected Meats appears to have adopted what was said by Brandon LJ (as he was) in Preston v. Preston ((1982) 1 All ER at 58) namely, there should be some special or unusual feature in the case to justify the Court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case before them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said (at 8) in Tetjio, "The categories in which the discretion may be exercised are not closed". Davies J expressed (at 6) similar views in Ragata.***
- 5. Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the***

³ At para [24].

discretion. I (sic) instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in Fountain and also by Gummow J in Thors v. Weekes (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in Tetijo); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J in J-Corp); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in Ragata); an imprudent refusal of an offer to compromise (eg Messiter v. Hutchinson (1987) 10 NSWLR 525, Maitland Hospital v. Fisher (No. 2) (1992) 27 NSWLR 721 at 724 (Court of Appeal), Crisp v. Keng (Supreme Court of New South Wales, 27 September 1993, unreported, Court of Appeal) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in EMI Records). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.

6. *It remains to say that the existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. The costs are always in the discretion of the trial judge. Provided that discretion is exercised having regard to the applicable principles and the particular circumstances of the instant case its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error or injustice."*

[30] I respectfully adopt these principles for consideration of the cost issue now before me. Do the facts and circumstances of the present case and the conduct of the Plaintiff justify a departure from the normal rule?

[31] The cause of action arose in December 2001. The Writ and Statement of Claim was filed on 9 April 2003. The Defence was filed on 15 May 2003. Summons for directions issued on 25 June 2003 and the Order on the Summons made on 16 July 2003. Defendant's List of documents were filed on 14 August 2003 and Plaintiff's List of documents were filed on 10 September 2003. The Plaintiff then went to sleep on his action for 3 years. There is no note of explanation as to why he did. He then filed a Summons on 25 April 2006 to enter the matter for trial. The Copy Pleadings for the trial Judge was also filed on 25 April 2006. The Summons was called on 23 June 2006 and two possible trial dates were allocated: 30 August 2006 or 19 October 2006. The matter was called on the first allocated date, 30 August 2006. The court file note says: "Should settle. Seek more time. Vacate hearing date. Confirm trial

date 19 October 2006.” On the day before the trial, the Defendant filed a Summons asking for the 19 October 2006 trial date to be vacated because the previous “in-house” lawyer that was handling this case had left the company’s employment and the new lawyer assigned to this case was not familiar with the case. So on 19 October 2006 the trial Judge granted the application and the matter further adjourned to 17 November 2006 to fix another hearing date. The file note for 17 November 2006 says: “Might be able to settle. Seek time. Adjourn to 15 December 2006, Court 4.” On 15 December 2006 both parties asked the matter to be adjourned to further explore settlement so it was adjourned to 2 February 2007. The Defendant at this stage had stopped handling the matter internally and had engaged “outside” counsel. The matter was further adjourned on 2 February 2007 to 16 March 2007 as “settlement talks were progressing”. On 16 March 2007 the Defendant’s new solicitors asked for more time to pursue settlement so the matter was further adjourned to 13 April 2007. On 13 April 2007 the Plaintiff sought another hearing date. Two dates were allocated: 17 July 2007 and 3 October 2007. On 17 July 2007 the trial could not proceed because there was another matter set down for trial before the same trial Judge on that day and the Pre Trial Minutes had not been filed. Also, the Defendant had sought leave to amend its Defence. Leave was granted and the Amended Defence filed on 19 July 2007. When the matter was called on 3 October the parties by consent had the matter adjourned to 23 November 2007. On 23 November 2007, the Plaintiff sought another hearing date. The trial Judge then adjourned the matter to 26 February 2008 before the Master, as it was the usual practice then. On 26 February 2008 the Master ordered certain pre-trial steps to be taken and further adjourned the matter to 24 April 2008. On 24 April 2008, the pre-trial steps had not been taken by the parties so the matter was again adjourned to 29 May 2008. Again the order had not been complied with so the matter was further adjourned to 11 August 2008. Again another adjournment to 8 September 2008 because the parties were not ready for trial. The matter was again adjourned to 11 September 2008. The Pre-trial Conference Minutes were eventually filed on 11 September 2008. The Plaintiff sought and obtained leave to file a Supplementary List of Documents and the matter was then adjourned by the Master to 10 November 2008 to fix a hearing date. The matter was again adjourned to 14 November 2008 because the Plaintiff had still not complied with the Master’s order. The Plaintiff’s Supplementary List of Documents were filed on 11 November 2008. On 14 November 2008 the matter was again adjourned to 9 February 2009 because the parties had not filed the agreed bundle of trial documents. On 2 February 2009 it was again adjourned to 3 March 2009 for the trial Judge to fix yet another hearing date. The trial Judge further adjourned the

matter to 13 March 2009 on which date the matter was eventually set down for trial on 14 July 2009. The trial Judge that set the matter down left the judiciary so the matter came before me. The trial finally proceeded on 14 July 2009. It has taken nearly 8 years from the date the cause of action arose to its final determination.

[32] Unfortunately, the travels of this matter through the High Court in Lautoka is not so unusual. I have come across more extraordinary dilatory journeys than this one. This case has passed through the hands of three Judges, one Master and two sets of lawyers. Ultimately, it is the primary responsibility of the Plaintiff to pursue his case as efficiently and as timely as he can. The matter was essentially ready for trial by the end of 2003. Why the Plaintiff went to sleep for nearly three years between September 2003 and April 2006 is not explained. There was a time when there was a "log jam" of cases in the High Court but it is obvious from the history of consent adjournments and adjournments necessitated by the parties not complying with court orders that the delay is not caused by the lack of judicial resources but of the parties own making.

[33] Legal practitioners should be very conscious of the potential prejudice to their clients' interests and their perception of and confidence in the profession and that of the general public when cases go to sleep in the registries. In **Harakh v Fiji Public Service Association [1994] HBC 347.94L, Ruling of May 2000**, an application to strike out a claim that had languished in the court for 6 years since its commencement and for which the plaintiff took no steps to advance it for 3 years, Mr Justice Gates, as he then was, said this in respect of the prejudice that delay can cause:

"This brings me to consider a second category of prejudice which could be called the public interest prejudice. This occurs when cases do not move through the court system with smooth and steady progression from writ to trial and judgment, from commencement to disposal. It is not in the public interest for cases to languish in court registries unresolved. No doubt solicitors report to their clients that it is the courts who cannot hear their cases. At the Lautoka High Court this has often been the reason for delay. However, that is no reason for litigants or their solicitors to allow their cases to go to sleep. The supply of judges may soon be cured. Case management is even more imperative therefore for the High Court at Lautoka than it is for the other court centres. A further factor to be weighed in the public interest category of prejudice is the added difficulty cast upon the trial judge. He or she has to hear from

witnesses with diminished recollections, and not to hear from witnesses who may have been able to supply the determinative evidence upon which the judge might with confidence have founded his decision. He is left instead with less than the originally available evidence, such remainder being less convincing than it could have been if it had been recollected and heard earlier. The Judge's decision is inevitably less sound and less confident. None of this is in the public interest for the operation of a fair system of justice. It would result said Lord Diplock in the Bremer Vulkan Case (supra)⁴ at 984 in "substantial risk that at the hearing the court would be unable to do justice." "And finally the judge's task would be well nigh impossible" Birkett v James (supra)⁵ at 304H. The mischief perceived by the courts was the inordinate delay in bringing actions on for trial" (per Lord Diplock op. cit at 984-5)."

[34] To this I respectfully add, as officers of the Court, lawyers have a duty over and above that owed to their clients to ensure that the court's limited resources are used effectively and efficiently.

[35] It is more alarming when this case is one so simple that it should not have reached trial at all. Had this fact been the only factor relevant to the consideration as to whether indemnity costs should be awarded or not I would have no hesitation in awarding indemnity costs. However, I am mindful that costs are paid by litigants and litigants rely on the advice of their legal advisers. It is near impossible to determine whether the reason for a matter such as this going to trial is a total reliance and blind faith on the legal advice given or it is the litigant's stubborn insistence, on the face of sound legal advice to the contrary, for his day in court. I am also mindful that the Plaintiff here is still unemployed and may have been waiting in the hope that he gets a judgment in his favour, although as Counsel for the Defendant had put to him in cross examination: "it was your own fault".

[36] The time taken for this matter to go trial is embarrassingly long. In the final analysis, both parties and their advisers are to be blamed. I do not think that in the circumstances I should depart from the normal rule despite my opinion that this was a hopeless case right from its inception.

⁴ [1981] AC 909.

⁵ [1978] AC 297.

[37] Since the Defendant has won, I award costs to it. The trial took only about an hour. The facts and the issues were not complicated. The Defendant had used its own "in-house" counsel during the early life of the case. I make no allowance for the various adjournments as both lawyers had at one time or another agreed to adjournments for either their own convenience or because of failure to comply with the trial time table. I think an award of \$500 for costs on a party-party basis is justified.

ORDERS

[38] I therefore make the following Orders:

- (a) The Plaintiff's claim is dismissed.**
- (b) The Plaintiff pays the Defendant's costs of \$500 within 2 months.**

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Sosefo Inoke
Judge

At Lautoka
23 July 2009